No. 89-644

In The

Supreme Court of the United States

October Term, 1989

HELEN ROBINSON,
Personal Representative of the Estate
of WILLIAM ROBINSON, Deceased,

Petitioner,

- VS -

THE TOWNSHIP OF WATERFORD,
DONALD BAILEY and TIMOTHY TARPENING,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE WATERFORD TOWNSHIP ORDINANCE GOVERNING DISORDERLY CONDUCT WAS CONSTITUTIONAL?

II.

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT A WRIT OF CERTIORARI WHEN THE DECISION OF THE COURTS BELOW CONFORM WITH PRIOR DECISIONS OF THIS COURT CONCERNING THE VOID-FOR-VAGUENESS DOCTRINE?

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COUNTER-STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS

Plaintiff's complaint was filed in the United States District Court for the Eastern District of Michigan on May 6, 1982. The various named defendants included the Respondent Township of Waterford.

The parties filed cross-motions for partial summary judgment seeking a ruling on the facial constitutionality of Township of Waterford Ordinance 87, Section 5.3. On September 21, 1983, the district court ruled that the ordinance was constitutional.

Former District Judge Guy subsequently granted Waterford Township's motion to dismiss or, in the alternative, motion for summary judgment as to the remaining claims against the municipality under 42 USC Section 1983 based upon allegations of inadequate training.

The case proceeded to trial against Defendants Tarpening and Bailey (police officers employed by Waterford Township) who received a no cause for action from the jury and Oakland County Sheriff Spreen against whom a jury verdict was rendered.

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit and that court issued its opinion on August 18, 1989 affirming the district court's decision as to the constitutionality of the Waterford Township ordinance. Plaintiff's motion for rehearing was denied by the Sixth Circuit on September 21, 1989.

II.

COUNTER-STATEMENT OF FACTS

Plaintiff's decedent, William Robinson, was arrested on May 24, 1980 by Police Officer Tarpening of Waterford Township. Decedent, who suffered from Alzheimer's Disease, was in the habit of wandering around the local shopping mall where he was arrested. In addition to wandering, decedent was in the habit of entering areas of stores which were closed to the public and taking food from the Sears cafeteria for which he could not pay. De-

fendant emitted an extremely offensive odor because his clothes were soiled with his own urine and excrement.

Decedent was charged with violation of Waterford Township Ordinance 87 governing disorderly conduct, specifically, Section 5.3 which provides:

> *5.0 HARRASSMENT. [sic] A person commits the offense of harrassment [sic] if, with intent to harass, annoy or alarm another person, he or she:*
>
> 5.1 Strikes, shoves, kicks or otherwise touches a person or subjects him or her to physical contact.
>
> 5.2 Follows a person in or about a public place or places.
>
> *5.3 Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts or conduct serve no legitimate purpose.*
>
> 5.4 Contributes to the delinquency of a minor by any act, or by any word, shall contribute toward, cause or tend to cause any minor child under the age of seventeen (17) years to become delinquent or neglected so as to come under the Juvenile Division of the Probate Court, whether or not such child shall in fact be adjudicated a ward of the Probate Court. (emphasis added)

Decedent was ordered to undergo a forensic examination at a pretrial hearing on the disorderly charge which ultimately resulted in his court-ordered commitment to a state institution. Decedent was never tried on the disorderly conduct charge.

REASONS FOR DENYING THE WRIT

IN ACCORDANCE WITH PRIOR DECISIONS OF THIS COURT, THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S RULING THAT SECTION 5.3 OF WATERFORD TOWNSHIP'S DISORDERLY CONDUCT ORDINANCE IS CONSTITUTIONAL.

The Sixth Circuit Court of Appeals correctly determined that Section 5.3 of Waterford Township's disorderly conduct ordinance is constitutional rejecting plaintiff's facial challenge to the ordinance on the basis of vagueness.

The precise language of the Waterford Township Disorderly Conduct Ordinance which plaintiff challenges is as follows:

> 5.0 HARRASSMENT. [*sic*] A person commits the offense of harrassment [*sic*] if, *with intent to harass, annoy or alarm* another person, he or she:
>
> 5.3 Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person, and which acts or conduct serve no legitimate purpose.

The Court of Appeals affirmed the district court's conclusion that the Waterford Township ordinance satisfies both criteria under the void-for-vagueness analysis because the ordinance affords fair notice of the conduct which would be violative of the ordinance and does not encourage arbitrary or discriminatory enforcement. Slip opinion at 7. The Sixth Circuit further concluded that the ordinance's specific intent requirement defeats plaintiff's claim that the ordinance is unconstitutionally vague. *Id.* at 8.

The void-for-vagueness doctrine, founded on due process requirements, was succinctly described by this

Court in *Colautti* v *Franklin*, 439 US 379, 390-91, 99 S Ct 675, 58 L Ed 2d 596 (1979):

> It is settled that, as a matter of due process, a criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' *United States* v *Harriss*, 347 US 612, 617, 98 L Ed 989, 74 S Ct 808 (1954), or is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' *Papachristou* v *Jacksonville*, 405 US 156, 162, 31 L Ed 2d 110, 92 S Ct 839 (1972), is void for vagueness. See generally *Grayned* v *City of Rockford*, 408 US 04, 108-109, 33 L Ed 2d 222, 92 S Ct 2294 (1974). This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. (citations deleted)

This doctrine will not invalidate a penal statute simply because more artful language could have been employed by the legislative body: "... this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." *Rose* v *Locke*, 423 US 48, 49-50, 96 S Ct 243, 46 L Ed 2d 185 (1976).

In *Colten* v *Kentucky*, 407 US 104, 108, 92 S Ct 1953, 32 L Ed 2d 584 (1972), this Court considered the constitutionality of a Kentucky disorderly conduct statute which defined intent in language almost identical to that used in Section 5.0 of the Waterford Ordinance:

> Ky Rev Stat Section 437.016(1)(f) (Supp 1968), which states:
>
> > '(1) a person is guilty of disorderly conduct if, *with intent to cause public incon-*

> *venience, annoyance or alarm,* or recklessly creating a risk thereof, he:
>
> * * *
>
> '(f) congregates with other persons in a public place and refuses to comply with the lawful order of the police to disburse. . . .' (emphasis supplied)

The conclusions reached by the Kentucky Court of Appeals were cited with approval: "We think that the plain meaning of the statute, in requiring that the proscribed conduct be done 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' is that the specified intent must be the *predominant* intent." (emphasis in original) *Id.* The Kentucky court further concluded that the accused was not engaged in any constitutionally protected activity at the time of his arrest.

In *Colten* v *Kentucky, supra,* this Court held that the Kentucky statute was constituutionally applied and further concluded: "Neither are we convinced that the statute is either impermissibly vague or broad." *Id.,* at 110.

Writing for the Court, Justice White stated:

> As the Kentucky statute was construed by the state court . . . a crime is committed only where there is no bona fide intention to exercise a constitutional right — in which event, by definition, the statute infringes no protected speech or conduct — or where the interest so clearly outweighs the collective interest sought to be asserted that the latter must be deemed insubstantial . . . . Individuals may not be convicted under the Kentucky statute merely for expressing unpopular or annoying

> ideas. The statute comes into operation only when the individual's interest in expression, judged in the light of all relevant factors is 'minuscule' compared to a particular public interest in preventing that expression or conduct at that time and place.

Id.,at 111.

This Court's analysis in *Colten* v *Kentucky, supra,* of the Kentucky disorderly conduct statute is equally applicable to the instant case. Not only does the Waterford Ordinance require that the accused act "with the intent to harass, annoy or alarm another person" but also that the accused's conduct must "serve no legitimate purpose" under Section 5.3. This language is highly significant because it serves to exclude any conduct which might be constitutionally protected, thereby, serving a legitimate purpose, from the purview of the ordinance.

In upholding the Kentucky statute, Justice White further explained the void-for-vagueness doctrine:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Id., at 110. The district court in this matter recognized the "dilemma" — "It appears to the court that the irony of what the court has before it today is that in an attempt to be extremely specific, the Township of Waterford now finds themselves subject to the charge, in effect, that they have cut the line too fine . . ." (Transcript of District Court Hearing on September 21, 1983, p. 36).

The Sixth Circuit held that the Waterford ordinance's specific intent requirement defeats plaintiff's vagueness challenge citing *Boyce Motor Lines* v *United States*, 342 US 337, 72 S Ct 329, 96 L Ed 367 (1951) and *Screws* v *United States*, 325 US 91, 65 S Ct 1031, 89 L Ed 1495 (1945). This principle was more recently affirmed in *Colautti* v *Franklin*, *supra:*

> This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.*

439 US at 368.

Petitioner argues that the decision in *Screws* v *United States, supra,* creates a more demanding standard than that utilized by the Sixth Circuit, however, petitioner incorrectly interprets that decision. In *Screws,* defendant challenged a federal statute imposing criminal sanctions on one who "willfully subjects . . . [citizens] . . . to the deprivation of any rights, privileges or immunities secured or protected by the constitution and laws of the United States." This Court found that the term "willful" required proof that the accused had the specific intent to deprive individuals of rights under the federal constitution or laws.

By interpreting the word "willful" in *Screws,* this Court has through judicial construction defined the specific intent. Here, the Waterford Ordinance does not merely state that an offense occurs when a person "willfully" engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another. Waterford Township has gone further than simply adding "willful" to the prohibited conduct by expressly describing the specific intent required — "with the intent to harass, annoy or alarm." Therefore, the Waterford

ordinance satisfies the requirements in *Screws* v *United States, supra,* because the ordinance requires in Section 5.0 a specifically described intent in addition to commission of the offense set forth in Section 5.3.

Petitioner's reliance on *Coates* v *Cincinnati,* 402 US 611, 91 S Ct 214, 29 L Ed 2d 214 (1972) is misplaced because that decision was based primarily on the infringement of First Amendment rights. *Coates* and other appellants were student demonstrators and pickets involved in a labor dispute who could not have been convicted under the Waterford ordinance because their conduct clearly served a legitimate purpose. In *Coates,* the court held:

> In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

The Cincinnati ordinance challenged in *Coates* v *Cincinnati,* provided that it was unlawful for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . ." Accordingly, on its face the Cincinnati ordinance appears to abridge the First Amendment right to freedom of assembly.

The United States Supreme Court has repeatedly held that closer scrutiny is required when legislation challenged as unconstitutionally vague also infringes on First Amendment rights, as was the case in *Coates* v *Cincinnati, supra. See also, Smith* v *Goguen,* 415 US 566, 573, 94 S Ct 1242, 39 L Ed 2d 605 (1974) and *Buckley* v *Valeo,* 424 US 1, 40-41, 96 S Ct 612, 46 L Ed 2d 659 (1976). By contrast, the Waterford ordinance does not encompass protected First Amendment activity because, as

previously noted, conduct which serves a legitimate purpose is expressly excluded.

Petitioner has failed to establish any grounds warranting review by this Court. The void-for-vagueness issue presented here has been repeatedly addressed by this Court in the cases previously cited, consequently, none of the arguments presented by petitioner involve considerations, such as those enumerated in Rule 17, which might justify exercise of this Court's discretion.

CONCLUSION

Defendant-Respondent, Township of Waterford, respectfully prays that the petition for writ of certiorari be denied and that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed.

Respectfully submitted,

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